THE POWER OF CONGRESS TO PRESCRIBE RAILROAD RATES.

IT is well known that a constitutional objection lies against at least one fundamental principle upon which the new railroad rate law has been constructed. That principle is embodied in the clause providing that the Interstate Commerce Commission may determine and prescribe just and reasonable rates to be observed as the maximum to be charged, which the railroad company shall not exceed. This, so to speak, is the crux of the law. A brief space may not unprofitably be occupied in an effort to ascertain, if we may, the true sources of this power to fix rates which apparently has been almost universally assumed to exist in Congress.

The familiar language of the commerce clause of the Constitution is as follows:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the Indian tribes."

This power to regulate, as Chief Justice Marshall has said, is "to prescribe the rule by which commerce is to be governed." The reason why this clause was put into the Constitution was in order that citizens of the different states should enjoy free commercial intercourse throughout the Union. Bearing this in mind, we have something to guide us in determining what meaning ought to be given to the term "regulate commerce." Whatever may tend to harass, impede, or prohibit commercial intercourse is to be enjoined.

Congress has exclusive and plenary power to legislate in every direction and upon all subjects wherein this governing principle is concerned. The mode of facilitating commerce is wholly within the authority of Congress to determine. Whether it be a wagon over a highway, a boat along a canal, or a freight car over a railroad, the underlying principle remains the same. Whatsoever the federal legislature in its wisdom shall deem necessary and requisite in order to maintain a perfect freedom of commercial intercourse between the states, it has the power and authority to deal with and apply through such provisions of law as it shall from time to time

see fit to enact. New conditions arise; new instruments of commerce come into use; but the purpose and object of the grant of power from the sovereign state to the United States does not change. The power may be extended to a larger range of objects, but its limits as to essential meaning remain the same.

It has been argued with no little force that, inasmuch as the words "commerce with foreign nations" and "among the several states" are embraced in the same clause, a like construction should be given to each kind of commerce. So far as the power to prescribe the mode or method of carrying on the business is concerned, the argument is unquestionably sound. Freedom to every citizen of a state to prosecute a commerce, foreign or interstate, unrestricted by hostile state legislation or interference, is guaranteed by this clause of the Constitution.

Keeping in view this simple principle, we ask ourselves the question: is prescribing the rate that a ship charterer or a railroad manager shall charge for carrying a ton of freight a regulating of commerce, within the meaning of this provision of the Constitution? Power to regulate does not necessarily imply that the price may be regulated at which the carrier shall transport goods. The behavior of the carrier may be a fit subject of legislation. If he demand an extortionate price for his services, he *pro tanto* impedes free commercial intercourse. Nobody presumes to deny that Congress may forbid extortion, and visit the practice of it with fine or imprisonment.

Extortion may be classed with the giving of rebates. In fact, Congress may take measures to guard against any and all practices that deprive shippers of their right to commercial intercourse between the same points upon equal terms with every other shipper. There is, however, an obvious distinction between regulating commerce in this manner in order to prevent wrongdoing and the fixing of a scale of rates for the daily conduct of business. That the rate fixed by a traffic manager may prove to be unreasonable, and thus in a remote way impede or restrict the freedom of commercial intercourse of shippers along the line of the road, is not a circumstance from which can be deduced the conclusion that the states have surrendered to Congress the power to prescribe interstate rates, even conceding that the states themselves had once possessed it. In other words, if the price asked by the carrier be merely unreasonable in amount, so that, however annoying to shippers, it cannot fairly be said to impede them to the

extent of preventing that freedom of commercial intercourse which parties are entitled to enjoy, there is no ground, it would seem, for Congress to interfere.

A state may authorize a municipality to regulate within its limits the sale of firearms or spirituous liquor. Such legislation confers no right upon the city authorities to compel a dealer to charge for a gun or for a glass of liquor such price only as they may have decided upon. Plainly it is not necessary, in order to accomplish the purpose for which the state has passed the statute, that the municipal officials meddle with the right of the storekeeper to sell his goods at such prices as he can obtain. That the citizen may be protected in his right to carry on unrestricted commerce, it surely seems not needful that the legislature prescribe what price he may obtain for commodities of which he is free to dispose. The right of a common carrier likewise to fix his own price for services belongs to him subject to having such portion as may be unreasonable recovered from him by a suit at common law. From time immemorial fixing such prices has been left to the carrier himself by bargain with the shipper.[1]

For years the railroads of this country had arranged their own rates for freight and passengers, except possibly in one or two instances where the charter had prescribed the rate. Had this question as to the right of Congress to prescribe rates been raised forty years ago, everybody would have answered it in the negative. Upon principle, looking at the situation as governed by the logical meaning of the grant to Congress, as it must have been in the minds of the framers of the Constitution, we are constrained to say that no such power has been given to Congress under this clause of the Constitution.

A word now as to the power of a state to prescribe railroad rates. It will be remembered that thirty years or more ago the legislatures of Illinois, Iowa, Wisconsin, and Minnesota enacted certain legislation in restraint of railroad companies. People were dissatisfied with the rates charged for passengers and freight. Public feeling ran very high. Four or five cases of large importance came up to the Supreme Court, and were decided in 1876. The points involved were argued by lawyers of the highest reputation. Until this Granger movement began, probably no one had ever

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[1] There is a class of transactions where the carrier enjoys a special privilege and is licensed to pursue his calling. Here the state very properly fixes the tariff.

dreamed that the legislature would interfere and take out of the hands of a railroad the right to fix a charge for performing the duties of a carrier.[1] So unheard of was the claim set up by the friends of this drastic legislation that one of the counsel was led to free his mind as follows:

"It cannot be seriously intended that the nature of the business gives the state any right to fix the carrier's compensation. I am not aware that it has ever been attempted in any civilized state, save in the peculiar legislation which has afflicted a few of the states in the northwest for the past two or three years."

Notwithstanding the formidable array of counsel, and the very searching extent of their arguments, the Supreme Court announced a conclusion far reaching in effect and radically departing from what had been theretofore considered the law. Chief Justice Waite delivered the opinion, which was concurred in by all the justices, except Field and Strong. The doctrine laid down is comprised in the following extract:

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to be controlled by that public for the common good to the extent of the interest he has thus created." [2]

This case was that of an elevator in Chicago, which the owner contended was private property. Railroad cases decided at the same time were subjected to the test of the same doctrine, and the constitutionality of the legislation was sustained.

A little later a similar question came before the New York

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[1] The late B. R. Curtis had given an opinion upon the legislation of Iowa and Wisconsin. An extract from his opinion was laid before the court, from which we quote as follows:

"We do not believe that it is within the power of any legislature in the United States to compel owners of property or persons, natural or political, to part with their property, or render other personal service at their own expense and risk to the public for prices fixed by the legislature. . . . A railroad corporation when carrying on the business of a common carrier, at its expense and risk, and for its own profit, cannot be distinguished from any other common carrier; its duties, its liabilities, and its rights are the same, whether they transact the business over a road which they own, or which they hire, or which nature has made for them in the shape of a navigable river, or which the public has built at its expense and thrown open for the common use; and unless it can be successfully maintained that the legislature may, by what is in truth a legislative decree, establish for the future prices for personal services and expenditures and risks incurred in rendering it, I am unable to see how this law can be brought within the field of legislation."

[2] Munn *v.* Illinois, 94 U. S. 126.

Court of Appeals, in the case of Budd, the owner of a private elevator. Judge Peckham (now a Justice of the Supreme Court) said of the former decision:

"I think that, notwithstanding the great respect which is entertained for the federal Supreme Court, the doctrines of the Munn case have never received the unqualified approval of the profession." [1]

Later, in 1891, Justices Brewer, Field, and Brown repudiated the doctrine of the Munn case, the dissenting opinion being written by Brewer: [2]

"I dissent from the opinion and judgment in these cases. The main proposition upon which they rest is, in my judgment, radically unsound. It is the doctrine of Munn *v.* Illinois reaffirmed."

Ten years after the decision in Munn *v.* Illinois, Mr. Justice Miller reminded the profession that at that date but three members of the court remained who concurred in the opinion.[3] He tells us that the main question in all the cases argued was the right of the state to establish any limitation upon the power of the railroad companies to fix the prices at which they would carry passengers or freight.

"It was strenuously denied, and very confidently by all the railroad companies, that any legislative body whatever had the right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges." [4]

The power of a state to interfere and fix the charges for freight and passengers of a railroad company that it has chartered may be considered as no longer open to question.

What bearing does this view of the right of a state over railroads have upon the inquiry, does Congress possess the power to prescribe rates? That it recognizes an enlarged control over the management of railroad corporations is apparent. As established law, it tends to create in the mind a belief that for the protection of the public the railroad in respect to its charges needs to be under the close and constant guardianship of the sovereign. Those

[1] 117 U. S. 50.
[2] 143 U. S. 548.
[3] Waite, C. J., Miller and Bradley, JJ.
[4] Wabash, etc., R. R. Co. *v.* Illinois, 118 U. S. 569 (1886).

who advocate the possession by Congress of the same power that a state exercises argue, if we understand it, somewhat as follows.[1]

The state has the right to regulate rates, because the railroad is devoted to a public use. The state may not legislate with regard to the shipment of freight from within its limits to a point outside the state. The power of Congress over interstate commerce is exclusive, and even though Congress has not legislated on the subject, the state has no right to deal with so much of the carriage as passes over a railroad within its own borders. Such is the decision in the Wabash case.[2] Now a state has surrendered to the United States all its sovereignty as to interstate commerce. So has the adjoining state. Combine these two acts of surrender, and the United States becomes possessed of the right that each state respectively might once have exercised.

There is something plausible in this ingenious contention. The theory, subtle though it be, answers well enough in respect to power that the state as a sovereignty unquestionably possesses over the carriage of passengers of goods within its borders. Where such carriage forms part of an interstate transaction, we may conceive of the state, so far as its own territory is concerned, as having parted with the right of control that it once enjoyed. No state had power to regulate commerce upon the highway of an adjoining state. Authority ended at the state line. Hence no power of an interstate character can have passed from a state to the United States, upon the adoption of the Constitution.

What took place was an abandonment by the state of the right (which up to that time had been freely exercised) of regulating such commerce upon its highways as was destined to pass out of the state into the territory of its neighbor. The adjoining state, in respect to its own highways, enjoyed a similar right. Out of these two distinct rights you cannot, by combining them, create a third right. In other words, the power "to regulate commerce among the states" was brought into being by the Constitution. It had no previous existence. The character of this new-born power is to be ascertained, and its extent measured, only by consulting the object and purpose of its creation. The states have ceased any longer to exercise a control that interferes with the complete and paramount right of the federal government.

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1 Whether a different rule applies to a state which has been formed from territory once belonging to the United States, is not here considered.

2 118 U. S. 569.

Because the commerce clause of the Constitution deprives a state of the right to fix taxes for the railroad carriage of an interstate shipment across its territory (or through a part of it), it by no means follows that Congress takes unto itself that privilege of which the Constitution has deprived the state. The truth is that there is no actual need that a power to prescribe rates for interstate commerce should be lodged anywhere outside of the railroad corporation itself. The doctrine of the Munn case, as has already been observed, may engender an idea that the public for their protection need the aid of a supervising political authority over the prices of railroad transportation, alike within a state and across its borders. Reflection, however, will convince students of the railroad problem that no such necessity exists in respect to interstate commerce business. Let the inequalities of service be corrected, and rates will take care of themselves.

Should the question of the power of Congress to prescribe rates be brought squarely before the Supreme Court of the United States for decision, an opportunity will be afforded for reviewing the doctrine of Munn *v.* Illinois, in the light of valuable experience gained since that decision was first announced. At that time the issue was confined to the validity of certain novel legislation in three or four northwestern states. The reasoning advanced by a majority of the justices in that notable opinion will be of only persuasive force when the court shall find itself compelled to pass upon the constitutionality of the power of Congress to prescribe rates for interstate commerce transportation.

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